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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 817

WHITAKER CABLE CORPORATION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDWIN S. D. BUTTERFIELD,
111 W. Washington Street,
Suite 1740, Chicago 2, Illinois,
Attorney for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Whitaker Cable Corporation, seeks this Court's Writ of *Certiorari* to review the final decision and judgment of the United States Court of Appeals for the Seventh Circuit holding that petitioner's sales discounts are unlawful by virtue of Section 2(a) of the Clayton Act (Robinson-Patman Act) (Title 15 U. S. C. A., Section 13) despite the fact that petitioner's sales do not exceed one per cent of the products directly competitive with its own sold in the national market.

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion of the Court of Appeals in the instant case is reported in 239 F. 2d at page 253 and is reprinted in full as Appendix I to this petition at pp. 11 to 17, *post.*

The final order and opinion of the Federal Trade Commission affirming the initial decision of the hearing examiner is reported in Commerce Clearing House Trade Regulation Reporter 1954-1955 at page 35,545 as paragraph 25,443 and is reprinted in full in the record printed for the Court below at pp. 465 to 476. The initial decision of the hearing examiner is unreported but is printed in full in the record printed for the Court below at pp. 453 to 464.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED.

The final judgment of which review is sought was entered December 14, 1956. A petition for rehearing was denied January 8, 1957. A final decree affirming the order of the Federal Trade Commission was entered January 10, 1957.

This Court's jurisdiction is invoked under Section 1254 of the Federal Judicial Code (Title 28 U. S. C. A., Section 1254; 69 Stat. 928).

THE QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are:

1. IS THERE IN LAW AN INESCAPABLE CONCLUSION THAT COMPETITIVE INJURY, WITHIN THE STANDARD OF THE ROBINSON-PATMAN ACT, IS PRESENT WHERE PURCHASERS, BUYING AND COMPETING IN THE RESALE OF THE MERCHANDISE, ARE CHARGED DIFFERING PRICES THEREFOR?

2. WHERE, AS IN THE INSTANT CASE, THE TOTAL SALES OF PETITIONER DO NOT EXCEED ONE PER CENT OF THE SALES OF DIRECTLY COMPETITIVE PRODUCTS OF ALL COMPETING SELLERS IN THE MARKET, DOES THE FEDERAL TRADE COMMISSION HAVE JURISDICTION, WITHIN THE STANDARD OF THE ROBINSON-PATMAN ACT, TO EXERCISE RULE MAKING POWER?

FEDERAL STATUTES WHICH THIS CASE INVOLVES.

This case involves the provisions of Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Title 15 U. S. C. A., Section 13; 49 Stat. 1526) and the effect which the limiting standard thereof has upon the jurisdiction of the Federal Trade Commission under Section 11 of the Clayton Act (Title 15 U. S. C. A., Section 21; 38 Stat. 734 as amended).

The pertinent provisions of the Robinson-Patman Act are as follows:

Robinson-Patman Act.

Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Title 15 U. S. C. A., Section 13; 49 Stat. 1526) provides:

> "(a) It shall be unlawful for any person engaged in commerce, * * * to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them; * * *."

Clayton Act.

Section 11 of the Clayton Act (Title 15 U. S. C. A., Section 21, 38 Stat. 734 as amended) provides:

> "Authority to enforce compliance with Sections 13 * * * of this title by the persons respectively subject thereto is hereby vested * * * in the Federal Trade Commission where applicable to all other character of commerce * * *."

STATEMENT OF THE FACTS.

The Federal Trade Commission issued a complaint against this petitioner on December 20, 1949, charging it with violating Section 2(a) of the Robinson-Patman Act (Title 15 U. S. C. A., Section 13) by discriminating in price between different purchasers of its products of like grade and quality. The Commission stated therein that the effect of petitioner's discriminations may be substantially to lessen competition or tend to create a monopoly or to injure, destroy or prevent competition with the petitioner or with the customers of the petitioner and its alleged favored purchasers (R. 2).

Answers and a motion was filed by the petitioner setting forth its volume discount schedules, denying the gravamen of the complaint and challenging the jurisdiction of the Commission (R. 5-11, 435) supported by a sworn affidavit that petitioner's sales did not exceed one percent of the total sales of such products in the market (R. 436). Evidence in support thereof (R. 423) was not rebutted by the Commission.

The trade witnesses examined in the course of the proceeding testified that there existed no competitive injury by virtue of petitioner's pricing practices (R. 244, 275, 288, 290, 304, 308, 315, 319, 325, 328, 331, 340, 350, 355, 370, 374, 384). These pricing practices had been in effect for over twenty-five years (R. 218, 425). Petitioner employs three hundred and fifty people (R. 429). Petitioner's customers did and could purchase the same products from other manufacturers (R. 203, 299, 328, 367).

It was stipulated in the record that future jobber witnesses if called in the areas listed on the Commission's charts would testify on direct examination that they had not suffered any competitive injury because of petitioner's

differing prices, and on cross-examination their testimony would be the same as that of the witnesses previously called (R. 404, 405).

The trial examiner determined that this Court had held in the *Morton Salt* case (*F.T.C.* v. *Morton Salt Company*, 334 U. S. 37) that an inescapable inference of competitive injury flows from price differentials (R. 463) and therefore issued a cease and desist order which was affirmed by the Commission on the same ground (R. 474).

Federal jurisdiction in the court of first instance was based upon a petition (R. 477) filed by the petitioner with the United States Court of Appeals for the Seventh Circuit pursuant to the provisions of Section 11 of the Clayton Act (Title 15 U. S. C. A., Section 21). That Court's affirming order is the judgment which is herein sought to be reviewed.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The special and important reasons which should elicit this court's writ of *certiorari* are: (1) that the questions presented herein have not but should be settled by this court; (2) that the rationale of the decision of the court below is in conflict with prior holdings of this court; and (3) that the decision of the court below is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

I.

The Questions Presented Have Not Been But Should Be Settled by This Court.

The instant case involves a question of law of important public interest in the field of public regulation of business. The case presents questions that have not been settled by this Court but should be.

Congress, in enacting the Robinson-Patman Act (Title 15 U. S. C. A. Section 13) did not purport to outlaw all differential pricing or make all price discriminations illegal. Congress discretely placed within the Act a standard within which the discrimination must fall before it comes within the prohibition of the Act.

The standard of the Act is encompassed in the qualifying and limiting phrase:

> "Where the effect of such discrimination may be substantially to lessen competition * * * or to injure, destroy or prevent competition * * *."

The rationale of the decision of the court below affirming the order of the Federal Trade Commission based upon the Commmission's own interpretation of the rationale of the decision of this Court in *F. T. C.* v. *Morton Salt Co.*

(334 U. S. 37), in effect, effectually reads out of the Robinson-Patman Act the limiting standard of "competitive effect". This is so for the reason that, if a pricing practice engaged in for a quarter of a century by a manufacturer selling less than one per cent of the products in the market, functionally interchangeable with its own, is held to be inferentially injurious, there is, in reality, no effective limitation on the jurisdiction of the Commission in matters involving price discrimination. To be within its jurisdiction a price discrimination must be illegal. If all price discrimination matters are within the jurisdiction of the Commission, then it must not only follow that all price discrimination is illegal, but that Congress so intended it. But in such an event expert competence would hardly be required.

II.

The Decision of the Court Below Is in Conflict With Prior Decisions of This Court.

There is a further reason for the elicitation of this Court's writ bottomed upon the fact that the court below has permitted the Commission to assume and exercise jurisdiction under the Commission's own interpretation of national policy, based solely upon an erroneous interpretation of this Court's decision in *F. T. C.* v. *Morton Salt Co.* (334 U. S. 37). In this the Commission exceeded the bounds of its competence. The Commission must receive competent evidence of its jurisdictional facts. It may not substitute therefor, by inference, a legal interpretation of this Court's *dicta*.

The decision of the court below affirming an order of the Commission so bottomed is in conflict with the prior decisions of this Court. (*F. C. C.* v. *R. C. A. Communications, Inc.*, 346 U. S. 86, 91; *Great Atlantic and Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147.)

III.

The Decision of the Court Below Is a Serious Departure from the Usual Course of Judicial Proceedings.

Within the field of human reason based upon practical and economic experience, to hold that a seller which occupies such an insignificant segment as one per cent of the competitive market, is injuring, or could injure or substantially lessen competition, is not only contrary to reason and experience, but the rationale of the decision below, based upon such circumstance, is so palpably untenable in fact as to constitute a serious departure from the accepted and usual course of judicial proceedings. Unless checked in its incipiency, the doctrine inherent in the rationale of that decision will undoubtedly encourage the Commission to continue to exercise illegal and excessive jurisdiction in the premises.

Armed with the *carte blanche* of an *ipse dixit* legal interpretation of this Court's *dicta* and the lower court's affirmance, to extend its authority into areas in which it presently has no jurisdiction or competence, the Commission would be free, within its discretion, to regulate the pricing structure of every small business under the Robinson-Patman Act.

It is conceivable that, without this Court's discipline, the Commission may prohibit all price discrimination and effectively establish a one-price system in the entire economy—and without Congressional authority.

The facts before the court in the *Morton Salt* case are vastly different from the record in the instant case. Morton Salt Co. was one of the largest producers and distributors of salt in the country. (*Morton Salt Co.* v. *F. T. C.* (C. A. 7), 162 F. 2d 949, 952.) The Commission there heard testimony from many witnesses in various parts of

the country to show that they had suffered actual financial loss on account of Morton Salt's discriminations. (*F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 50.) This Court pointed up on page 49 of its opinion that in enacting the Robinson-Patman Act Congress was especially concerned with protecting small business.

This Court did not feel the necessity in that case to decide under what circumstances, if any, the Commission might prohibit differentials which do not of themselves tend to injure competition. (*F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 53-54.) In the instant case the Court below was presented with the uncontradicted evidence that the petitioner sold less than one per cent of the competitive product in the market coupled with the positive and unrebutted testimony of all of the trade witnesses that no competitive injury had been suffered. The Commission was not able to produce from the date of the passage of the Robinson-Patman Act in 1936 to the date of the final hearing in this cause a single witness to testify that he had been or could be injured by petitioner's pricing practices. The court below in affirming, in effect, ignores the limiting standard of "substantial lessening of competition" and in doing so violated the basic rules of evidence by drawing a dubious inference of a jurisdictional fact in the face of positive evidence to the contrary.

This case presents the necessity of determining whether or not the court below has sanctioned an illegal exercise of jurisdiction and whether or not the Commission has not gone too far in interpreting national policy and further, has not gone too far in extending its activities far beyond the scope of its competence and jurisdiction.

IV.

Conclusion on the Merits.

The basic problem which emerges from the foregoing is whether or not the Congress intended that the Robinson-Patman Act be used as a shield for small business in its important contribution to the business economy or whether the Act is to be used as a weapon in destroying its competitive effectiveness by bringing small business, also, under the stringent discipline of monopoly regulation. This case is of sufficient importance to elicit *certiorari*.

PRAYER FOR CERTIORARI.

For the reasons urged in this petition, petitioner respectfully seeks this Court's writ of *certiorari* to review and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

EDWIN S. D. BUTTERFIELD,
111 W. Washington Street,
Suite 1740, Chicago 2, Illinois,
Attorney for Petitioner.

March 4, 1957.

APPENDIX I.

WHITAKER CABLE CORPORATION, Petitioner

vs.

FEDERAL TRADE COMMISSION, Respondent.

December 14, 1956; Rehearing Denied January 8, 1957.
239 F. 2d 253.

Before FINNEGAN, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SWAIM, *Circuit Judge.* Petitioner seeks to set aside a cease and desist order entered by the Federal Trade Commission at the conclusion of proceedings on a complaint charging it with violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13. The complaint, issued on December 20, 1949, charged that petitioner, Whitaker Cable Corporation, had violated and was violating Section 2(a), as amended, by "* * * directly or indirectly discriminating in price between * * * different purchasers of its * * * automotive products and supplies of like grade and quality * * * by selling said products and supplies at higher and less favorable prices to numerous small businessmen purchasers than said products and supplies [were] sold to various larger purchasers generally competitively engaged * * * with said less favored purchasers."

Petitioner is engaged in the manufacture of automotive cable and related parts for the replacement parts market.

It sells its products on a nationwide basis to automotive jobbers and to oil and tire companies under the Whitaker brand name and under various private brand names. It is undisputed that petitioner sold its products to such jobbers and oil and tire companies at substantially different net prices. These variations in net price resulted primarily from the application of a rebate schedule based on the total annual volume of purchases made, although certain of petitioner's accounts were charged on the basis of a price schedule reached through private negotiations. Petitioner made no effort to demonstrate any cost justification for its pricing practices, nor did it show that the price discriminations were made in good faith to meet equally low prices of competitors.

Petitioner attacks the order on the grounds that there was insufficient evidence to justify the Commission's finding of probable injury to competition and that it was not accorded a fair hearing.

Petitioner urges that the finding of probable injury to competition cannot be sustained because: (1) the Commission failed to prove injury in fact; (2) direct testimony by some of petitioner's purchasers that they had not lost sales because of petitioner's pricing policies negated a finding of probable injury; (3) petitioner's pricing policies followed custom and trade practice; and (4) petitioner's sales did not exceed one per cent of the products directly competitive with its own sold in the national market.

The Act, in part, prohibits a seller from discriminating "* * * in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly * * * or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such

discrimination, or with the customers of either of them * * *." 15 U.S.C.A. § 13(a). In *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. 726, at p. 738, the court stated:

> "It is to be observed that § 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect."

See also *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46; *National Lead Co.* v. *Federal Trade Commission*, 7 Cir., 227 F. 2d 825, 835.

This is not to say, however, that the Commission may never lose its case by failing to introduce evidence of injury in fact. In view of the statutory language of Section 2(a) and the well settled construction thereof that Section 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition, we take petitioner's contention in this regard as one that, on the facts of this case and particularly in light of the direct testimony by some of petitioner's purchasers that they had not lost sales because of petitioner's pricing policies, the Commission was not justified in disregarding this direct evidence and basing its finding of probable injury on inference. Petitioner finds support for this argument in Commissioner Mason's dissent in this case—the rationale of which is set forth in his dissenting opinion in *In the Matter of Moog Industries, Inc.*, Docket 5723, aff'd *Moog Industries, Inc.* v. *Federal Trade Commission*, 8 Cir., No. 15370, decided November 5, 1956. The rationale of his disagreement with the majority opinion in the *Moog* case is that if there is no direct evidence on the question of injury, inference may fill the "empty spaces." But the spaces had best be empty of direct facts before inference is permissible.

Without questioning the soundness of this observation, see *United States* v. *United States Gypsum Co.*, 67 F. Supp. 397, 450, rev'd on other grounds 333 U. S. 364, we shall pass to a consideration of the evidence before the Commission.

The record shows price discriminations of considerable magnitude—ranging as high as 30 per cent in net buying price; that petitioner's purchasers sold in a market where competition was keen; that these purchasers operated on small profit margins; that many of the purchasers found it expedient to enter into group buying arrangements for the purpose of aggregating their purchases and thus obtaining higher volume discounts than they would otherwise receive on their individual volume of purchases.

On the basis of these facts the Commission found what would appear to be obvious—that the competitive opportunities of certain purchasers were injured when they had to pay petitioner substantially more for petitioner's products than their competitors had to pay. Further, the inferences drawn by the Commission from these facts are not inconsistent with the evidence adduced by petitioner. The sum and substance of the testimony by petitioner's purchasers was that they had not lost sales as a result of price cutting by their competitors in petitioner's products. Whatever the inherent force of this testimony might otherwise be, it was dissipated by the fact that petitioner's suggested resale prices were maintained for the most part. Nevertheless, it is rather tenuous to argue that because particular purchasers did not lose sales notwithstanding the disparate prices charged by petitioner, there can be no finding of probable injury to competition. Volume of sales does not constitute the only evidence that reflects the health of the competitive scene. See *Bruce's Juices* v. *American Can Co.*, 87 F. Supp. 985, 990, aff'd 187 F. 2d 919, modified 190 F. 2d 73, cert. dismissed 342 U. S.

875. We find no basis for substituting our judgment for that of the Commission.

With regard to petitioner's contention that its pricing policies followed custom and trade practices in an attempt to meet equally low prices of competitors, the evidence adduced by petitioner was at best dubious. In fact, petitioner's president testified that it had always been petitioner's practice to have the highest priced line in the market. And the fact that petitioner adopted and followed the discount system employed by its competitors does not necessarily preclude a finding of Section 2(a) violation. See *Federal Trade Commission* v. *Staley Co.*, 324 U. S. 746, 753.

Petitioner next urges that since its sales did not exceed one per cent of the products directly competitive with its own sold in the national market, there can be no finding of a reasonable probability of injury to competition. Petitioner employed 350 personnel in its facilities and its annual sales volume for the year 1949 approximated $2,000,000.00. At the time of the hearing 40 to 50 per cent of the replacement parts market was occupied by the major car manufacturers, but petitioner sold 8½ per cent of the 14,000 jobbers operating in this market.

The Commission answered petitioner on this point as follows:

> "This argument loses sight of the fact that competitive injury between [petitioner] and its competitors is not at issue in this proceeding and [petitioner's] relative position in the industry is not controlling to a determination that its pricing practices may not have had the effect ascribed to them by the hearing examiner [*i.e.*, the injury to 'second line competition']."

The Commission did not concede that Whitaker was insignificant in the automotive replacement parts market.

There is adequate evidence in the record to sustain the Commission's finding that petitioner was a major manufacturer in the replacement parts industry and that the amount of business done by petitioner was substantial. Petitioner's contention in this regard is lacking in merit.

However, the Commission, not satisfied with having proved its case, goes on to say in its appeal brief that:

> "* * * we wish to emphasize that Whitaker's standing among such manufacturers is not a material factor in connection with injury to customer competition." Brief for Respondent at p. 21.

Petitioner's relative position in the industry standing alone is, of course, of no particular significance, but in so far as it reflects relative size, this is a material factor which the Commission should consider. Congress has not outlawed price differentials *per se,* unjustified though they may be. The Act was not intended to reach every remote, adverse effect on competition. The effect must be substantial. See *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 357; *Standard Oil Co.* v. *United States,* 337 U. S. 293; *Minneapolis-Honeywell Regulator Co.* v. *Federal Trade Commission,* 7 Cir., 191 F. 2d 786, at p. 790, cert. dismissed 344 U. S. 206, "And we construe the Act to require substantial, not trivial or sporadic, interference with competition to establish violation of its mandate." If the discrimination complained of does not, cannot and will not have the defined effect of injury to or substantial lessening of competition, or tendency to create a monopoly, the Act has not been violated and the Commission is without authority to prohibit such discrimination. *Anchor Serum Co.* v. *Federal Trade Commission,* 7 Cir., 217 F. 2d 867. This is implicit in the very language employed by the Act. Any other construction would turn the Act into a price control law contrary to its manifest purpose. We do not mean to suggest that the Act may be

violated a little without fear of its sanctions but rather that insignificant "violations" are not, in fact or in law, violations as defined by the Act. If the amount of the discrimination is inconsequential or if the size of the discriminator is such that it strains credulity to find the requisite adverse effect on competition, the Commission is powerless under the Act to prohibit such discriminations whether first line or second line competition be involved.

Finally, petitioner complains that the hearing examiner in this proceeding also held a hearing in a factually related matter in which petitioner did not participate. That proceeding involved eight automotive parts jobbers charged with knowingly inducing and receiving discriminatory prices by means of a group buying arrangement in violation of Section 2(f) of the Clayton Act, as amended. Petitioner was not a party to that proceeding and the issues were not the same as those involved in the instant case. Any order that might have issued in that proceeding could not have affected or prejudiced petitioner. We fail to see in what manner petitioner was prejudiced and petitioner does not indicate in what way it was prejudiced other than its assertion that such conduct by the hearing examiner violated "concepts of basic fairness." But see *Dolcin Corp.* v. *Federal Trade Commission,* App. D. C., 219 F. 2d 742, 745-46, cert. denied 348 U. S. 981; *cf. Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 700-703.

We have considered the other issues raised by petitioner and find them to be equally untenable.

The order is

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 817

WHITAKER CABLE CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet. 11–17) is reported at 239 F. 2d 253.

JURISDICTION

The judgment of the Court of Appeals affirming and enforcing the Commission's cease and desist order was entered on January 10, 1957. The petition for a writ of certiorari was filed on March 6, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether there is substantial evidence to support the Federal Trade Commission's finding that the effect of petitioner's price discriminations of thirty percent

and more among different purchasers may be substantially to lessen competition or to injure or destroy competition with persons receiving the benefit of such discrimination.

STATUTE INVOLVED

Section 2 (a) of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13 (a), provides in part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.

STATEMENT

The Commission in December 1949 filed a complaint charging that petitioner, which manufactures and sells automotive cable products and related parts (R. 454), had been discriminating in price among different purchasers of products of like grade and quality, in violation of Section 2 (a) of the Clayton Act (R. 2–5). After taking evidence, the hearing examiner filed an "Initial Decision" holding that petitioner had violated the Act as charged, and proposing a cease-and-desist order (R. 454–64). On appeal, the Commission affirmed the examiner's findings of fact, conclusions, and order (R. 465–76).

Petitioner sells its products "on a nationwide scale" (R. 470). Its sales in 1949 were approximately $2,000,000 (R. 476). Petitioner's customers included 450 "warehouse jobbers" (who purchase directly from it) (R. 44, 456), 700 "wholesale distributor jobbers" (who purchase through the "warehouse jobbers") (R. 43, 456–57), and at least five "group purchasing associations" of jobbers (R. 456). These customers comprised about 8½% of the 14,000 jobbers in the market (R. 423). Petitioner also sells to at least four oil and tire companies ("private brand purchasers"), which resell petitioner's products under the purchaser's brand name (R. 457–458, 470).

At the end of each year, petitioner granted a retroactive rebate (which it termed a "discount") graduated according to the annual volume of purchases (R. 470). The rebates granted to individual jobbers ranged from 5% on annual purchases of between $600 and $1,000, to 17½% on purchases of $3,000 or more (R. 455).[1] Jobbers who were members of group purchasing associations received as much as a 20% rebate on their purchases (R. 470).[2] Discounts granted to

[1] In addition to the rebate, petitioner also granted a freight allowance on shipments of a prescribed minimum size, and a 5% trade discount on purchases of $150 or more (R. 456). Some "warehouse jobbers" received a 20% discount on large purchases in lieu of the graduated rebate and the 5% trade discount (R. 456).

[2] Members of group purchasing associations ordered directly from petitioner or through the group office; petitioner shipped to the jobber but billed the group office, with which the jobber made settlement; and at the year's end petitioner paid the group office the rebate payable on the dollar value of purchases of all members of the group. The rebate was then divided among the members in proportion to their individual purchases. The Commission

"private brand purchasers" were not graduated according to volume, but varied among individual purchasers from 20% (American Oil Co. and Phillips Petroleum Co.) to 35% (Goodyear Tire and Rubber Co.) (R. 472).[3]

The Commission found that all of petitioner's customers, including the "private brand purchasers", are in competition with each other in the resale of petitioner's products (R. 470, 472; 458, 459, 463), and that the market for reselling such products is "highly competitive" (R. 454). Jobber witnesses testified that they "invariably" took a 2% cash discount, which they regarded as essential to the operation of their business (R. 474, 461; 119, 125, 135, 137). At least two jobbers testified that their overall net profit was between 3% and 4% (R. 241, 461), although three others indicated that their net profit was closer to 2% or even less (R. 135, 222, 306). Among the six purchasers of petitioner's products in 1949 in the Denver area, discounts varied from 1.48% (to a "wholesale distributor") to 35.53% (to a "private brand purchaser"). Discounts ranged from 4.68% to 40.38% among the seven purchasers in Dallas, Texas; and in New Orleans, discounts varied from 5.34% to 35.02% among five purchasers (R. 459–60, 473).

In upholding the examiner's finding (R. 462) that petitioner's price discriminations "had, and may have, the effect of substantially lessening competition among

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found that this method of buying was a bookkeeping device to obtain for association members a higher rebate (and consequent lower price) than that available to non-members (R. 470).

[3] "Private brand purchasers" also received a 2% or 3% "boxing allowance" (R. 472).

its customers and of injuring and preventing competition among them," the Commission stated (R. 474) that the record "clearly demonstrated" both the "substantiality" of the discriminations and "the probability of injury to competition." It pointed out (*ibid*) that the profits of petitioner's customers were, because of the "very nature" of their business, "necessarily based upon an accumulation of small margins of profits on * * * thousands of different items, some of which sell for only a few cents"; that "the price differences resulting from respondent's [petitioner's] pricing practices must materially affect the business health of respondent's customers and that purchasers who paid the higher net prices were at a competitive disadvantage with the purchasers who paid the lower net prices" (R. 474–75); and that even though petitioner's percentage of the total automotive parts industry was less than 1%, its $2,000,000 in annual sales represented a "substantial" portion of the market in which it did business (R. 476).

The Court of Appeals unanimously affirmed the Commission's order. The court held (Pet. 16) that there was "adequate evidence" to sustain the Commission's findings that petitioner was "a major manufacturer" in the replacement parts industry and that it did a "substantial" volume of business; that the record showed price discriminations of "considerable magnitude" given to purchasers who operated on "small profit margins" and "sold in a market where competition was keen" (Pet. 14); and that these facts supported the Commission's finding of "what would appear to be obvious—that the competitive opportuni-

ties of certain purchasers were injured when they had to pay petitioner substantially more for petitioner's products than their competitors had to pay" (*ibid*). The court rejected the contention that testimony by petitioner's purchasers that they had not lost sales as a result of price cutting by their competitors in petitioner's products precluded a finding of "probable injury to competition," since "[v]olume of sales does not constitute the only evidence that reflects the health of the competitive scene" (*ibid.*).

ARGUMENT

Section 2 (a) of the Clayton Act makes it unlawful to discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination "may be" substantially to lessen or injure competition in any line of commerce. In order to establish a violation of Section 2 (a), it is not necessary to show that price discrimination has in fact injured competition, but merely that there is a "reasonable probability" or a "reasonable possibility" of such injury. *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726, 738, 742; *Federal Trade Commission* v. *Morton Salt Co.,* 334 U. S. 37, 46, 47. The Court of Appeals held that the Commission properly found "what would appear to be obvious" on the record, namely, that "the competitive opportunities of certain purchasers were injured when they had to pay petitioner substantially more for petitioner's products than their competitors had to pay," and that the effect of petitioner's price discriminations therefore "may" be substantially to

injure competition among petitioner's customers. In so holding, the Court of Appeals correctly applied the doctrine of the *Morton Salt* case, *supra,* that it is "self evident" that "competition may be adversely affected by a practice under which" a manufacturer charges substantially different prices to competing purchasers. 334 U. S. at 50.

Petitioner's annual sales were about two million dollars (R. 476). Petitioner contends (Pet. 7), however, that since its sales comprise less than 1% of the total sales of auto parts its discriminatory pricing practices cannot be deemed to create the possibility of any "substantial" injury to competition. But petitioner is at least the third largest producer of automotive cable and related parts for replacement purposes, with plants in North Kansas City and St. Louis, Missouri and Philadelphia, Pennsylvania (R. 429–430). Moreover, the market in which the Commission found possible injury to competition was that of petitioner's customers. As among petitioner's customers (some 8½% of the jobbers) petitioner's share of their purchases was obviously far in excess of 1%, and presumably comprised a substantial part of their business. Variations in effective price of as much as 30% or more on purchases from petitioner would thus have a substantial overall effect on competition among this group of jobbers.

Petitioner further contends (Pet. 9) that the Commission ignored "positive and unrebutted testimony" that its customers had, in fact, suffered "no competitive injury" from its discounts. This testimony was equivocal and inconclusive. Typically, petitioner's

counsel asked each witness whether his company had been injured competitively by the spread in petitioner's discounts or by a larger discount granted to a specific competitor, and each witness replied that he knew of no such injury (R. 231, 289–90, 319, 324–25, 330–31, 349–51, 354–55, 374, 384). On cross-examination, however, the witnesses admitted that they would like to buy as cheaply as possible (R. 247, 248, 292, 309, 325, 372) or would prefer the larger discount given to a specific competitor (R. 312, 326, 372); and that lower costs resulting from larger discounts would help their profits (R. 250, 279, 293, 310, 317–18, 325, 385), permit expansion of business (R. 310, 329), and therefore help them competitively (R. 279). As the court of appeals correctly held (Pet. 14), their direct testimony cannot be deemed to foreclose a finding of possible injury to competition, since "[v]olume of sales does not constitute the only evidence that reflects the health of the competitive scene." See *Moog Industries, Inc.* v. *Federal Trade Commission,* 238 F. 2d 43, 50–52 (C. A. 8), certiorari denied on this point, March 25, 1957, No. 750, this Term.

In view of the evidence that there was keen competition among petitioner's customers, that many of them operated on extremely narrow margains, and that petitioner's discounts were substantial and varied widely in amount (see *supra,* pp. 3–4), the Commission did not err in finding that petitioner's price discriminations may substantially injure competition. Moreover, the correctness of that finding presents no question meriting further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
ERNEST L. FOLK III,
Attorneys.

EARL W. KINTNER,
General Counsel,
ROBERT B. DAWKINS,
Assistant General Counsel,
Federal Trade Commission.

APRIL 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957

REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 817

WHITAKER CABLE CORPORATION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY TO BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDWIN S. D. BUTTERFIELD,
111 W. Washington Street,
Suite 1740,
Chicago 2, Illinois,
Attorney for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

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WHITAKER CABLE CORPORATION,
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REPLY TO BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPINION BELOW.

The opinion of the Court below is reported in 239 Fed. 2d 253.

JURISDICTION.

Jurisdiction is invoked under Section 1254 of the Federal Judicial Code (Title 28 U. S. C. A. Section 1254; 69 Stat. 928).

QUESTION PRESENTED.

Where the total sales of petitioner do not exceed one per centum of the sales directly competitive with its own, does the Federal Trade Commission have jurisdiction to exercise rule making power within the Robinson-Patman Act standard of injury to competition?

STATUTE INVOLVED.

Robinson-Patman Act.

> "It shall be unlawful for any person engaged in commerce * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them; * * *."

COUNTER STATEMENT.

Contrary to respondent's statement on page 5 of its brief in opposition, petitioner's percentage of the total automotive parts industry is less than five ten-thousands thereof. (Rec. 476, 454.) Petitioner's sales in the after market replacement parts industry were less than $1,000,000 in a market of $3,000,000,000. In the particular segment of this market, petitioner's sales were less than 1% of the products competitive with its own. (Rec. 476.)

Petitioner, a small manufacturer, within the meaning of the small business act, employs less than 10% of the number of employees of one of its competitors (Rec. 429) and has less than 10% of the annual sales volume of another of its competitiors. (Rec. 430.) Petitioner is restricted by competition to less than 10% of its potential market. (Rec. 428.)

ARGUMENT.

Petitioner contends that, since its sales comprise less than 1%—not of the total sales of auto parts—but of that small segment of the market for which it manufactures—that its competitive impact is so insignificant as to be beyond the pale and standard of the Robinson-Patman Act.

During the course of the hearings, respondent was unable to produce a single witness to testify to competitive injury. This was so because 99% of the industry segment was occupied by competitor's sales of which at least 25% was controlled by a single distributor (Rec. 426), all of whom used the same pricing practices as used by petitioner. (Rec. 425.)

It is both unjust and unfair that petitioner should be subject to the competitive disadvantage of a cease and desist order against differential pricing as against its gigantic competitors engaged in the same pricing practices against whom no such action has been taken. (Rec. 425, 426.) It is most unreasonable that the weak be restrained against the strong.

The Robinson-Patman Act must be given an interpretation that recognizes a a delimited standard, otherwise the act is unconstitutional and in contravention of Article I of the Constitution of the United States.

The court below, in failing to recognize at least some limit to the operation of the Act, in effect, abdicated the function of judicial review of administrative action.

For the reason that the lower court placed no limits on the exercise of administrative action in the areas comprising less than 1% of the economic impact, petitioner

prays that this court exercise its power of supervision herein, and to that end, respectfully proposes the elicitation of this court's writ of certiorari.

Respectfully submitted,

EDWIN S. D. BUTTERFIELD,
111 W. Washington Street,
Suite 1740,
Chicago 2, Illinois,
Attorney for Petitioner.

April 8, 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 817

WHITAKER CABLE CORPORATION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR REHEARING OF ORDER OF APRIL 22, 1957 DENYING CERTIORARI.

EDWIN S. D. BUTTERFIELD,
111 W. Washington Street,
Suite 1740,
Chicago 2, Illinois,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 817.

WHITAKER CABLE CORPORATION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR REHEARING OF ORDER OF APRIL 22, 1957 DENYING CERTIORARI.

Petitioner prays for a rehearing of this Court's order of April 22, 1957 denying certiorari.

OPINION BELOW.

The opinion of the Court below is reported in 239 F. 2d 253.

JURISDICTION.

Jurisdiction is invoked under Section 1254 of the Federal Judicial Code (Title 28 U. S. C. A. Section 1254; 69 Stat. 928).

QUESTION PRESENTED.

Whether the failure of the Court of Appeals to hold its Judgment and Order in abeyance or to exercise its equit-

able powers and original jurisdiction, until the numerous competitors of petitioner who are using similar forms of volume discounts, which are standard in the industry, can be subjected to similar judgments and orders; whether such failure by the Court of Appeals is inequitable, unjust and unfair when petitioner is subjected to the judgment and decree of the court while petitioner's numerous competitors may still continue to offer volume discounts inevitably causing petitioner to suffer loss of business and subsequent financial loss; and whether under such circumstances the Court should exercise its original equitable jurisdiction to protect the rights of the petitioner.

STATUTE INVOLVED.

Section 2(a) of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13(a), provides in part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them: * * *.

STATEMENT OF GROUNDS FOR REHEARING.

Since March 6, 1957, the date of the filing of the petition for certiorari herein, this court granted certiorari in a question similar to the question presented herein in the case of *Moog Industries, Inc.* v. *Federal Trade Commission*, October 1956 Term, No. 750, Writ of Certiorari granted March 25, 1957, 25 Law Week 3277. In addition there has

since been docketed with this court the case of *E. Edelmann & Company* v. *Federal Trade Commission,* October 1956 Term, No. 900 presenting substantially the same question.

The *Moog Industries* case involves a conflict between 8th Circuit and the 7th Circuit holding in *C. E. Niehoff & Co.* v. *Federal Trade Commission,* 241 F. 2d 37. The *Edelmann* case (*E. Edelmann & Company* v. *Federal Trade Commission* (7th Cir.), 239 F. 2d 152) involves an intra-circuit conflict.

The *Edelmann, Moog, Niehoff* and *Whitaker* cases all belong to a group of Federal Trade Commission complaints against manufacturers of automotive replacement parts. The oral arguments before the 7th Circuit Court of Appeals in the *Edelmann, Niehoff* and *Whitaker* cases were heard consecutively. The *Edelmann* and *Whitaker* opinions were handed down the same day. The Court in its opinion in the *Niehoff* case cites its holdings in the *Edelmann* and *Whitaker* cases as controlling in *Niehoff*. Only in the *Niehoff* case, however, was the court's enforcing order held in abeyance depending upon the future course of the Commission's proceedings against Niehoff's competitors.

Present counsel for this petitioner personally tried both the *Moog* and *Whitaker* cases before the Federal Trade Commission on the same theories and substantially the same evidence. Commissioner Mason's dissent in the *Moog* case was cited as the rationale for his dissent in the *Whitaker* case (R. 476).

The conflict within the 7th Circuit and between the 7th and 8th Circuits present substantial grounds for certiorari available to petitioner although not previously presented.

The intervening circumstance of the granting of the writ in the *Moog* case (Docket No. 750) is of substantial effect on the petition in the *Whitaker* case in view of the questions presented and similarity between them.

It would be unfair, should relief be granted in the *Moog* case, to deny the same to Whitaker.

Petitioner therefore prays for a rehearing of the order of April 22, 1957 denying certiorari.

Respectfully submitted,

EDWIN S. D. BUTTERFIELD,
111 W. Washington Street,
Suite 1740,
Chicago 2, Illinois,
Counsel for Petitioner.

April 25, 1957.

CERTIFICATE OF COUNSEL.

I hereby certify that this petition for rehearing is presented in good faith and not for delay and the petition is restricted to the grounds and question above specified.

Signature .....

EDWIN S. D. BUTTERFIELD,
Counsel for Petitioner.